



## Is Your Hospital Ready to Re-Open for Elective Medical Services?

On April 19, 2020, the Centers for Medicare and Medicaid Services (“CMS”) provided its initial guidance to hospitals and other healthcare facilities (collectively, “Hospitals”) as they begin to consider the timing for re-commencing normal operations as the COVID-19 outbreak begins to subside in some parts of the United States (the “Re-Opening Recommendations”).<sup>[1]</sup> In a sense, the Re-Opening Recommendations are the bookend to the guidance CMS provided on March 18, 2020 recommending that Hospitals discontinue the provision of non-emergent and elective medical services and treatments during the COVID-19 outbreak.<sup>[2]</sup> In each case, the guidance provided by CMS is neither legally mandated nor enforceable. Instead, the guidance merely provides a framework or frame of reference for use by Hospitals as they consider these decisions.

In providing the Re-Opening Recommendations, CMS acknowledges that the postponement of non-emergent and elective medical services and treatment during the COVID-19 outbreak has had a detrimental impact on the financial condition of Hospitals that provide such services and on the health of the patients that need such services. As a result, the Re-Opening Recommendations provide flexible guidelines that each Hospital can use as it considers when and how to recommence normal operations.

### Gating Criteria

As a starting point, the Re-Opening Recommendations state that a Hospital should not begin the process of recommencing normal operations until the state or region in which the Hospital is located has passed the Gating Criteria announced by the White House on April 16, 2020.<sup>[3]</sup> The Gating Criteria examine three (3) core factors

related to the current state of COVID-19 illness in the state or region and the ability of the Hospital to meet the needs of both COVID-19 and non COVID-19 patients without jeopardizing the health of its workers:

1. **Symptoms** – The state or region in which the Hospital is located has:
  - a downward trajectory of influenza-like illnesses (ILI) reported within a 14-day period; and
  - a downward trajectory of covid-like syndromic cases reported within a 14-day period.
2. **Cases** – The state or region in which the Hospital is located has:
  - a downward trajectory of documented cases of COVID-19 within a 14-day period; or
  - a downward trajectory of positive COVID-19 tests as a percent of total COVID-19 tests within a 14-day period (flat or increasing volume of tests).
3. **Hospital** – The Hospital:
  - is able to treat all patients within the normal standard of care (i.e., not the crisis standard of care); and
  - has a robust testing program in place for at-risk healthcare workers, including emerging antibody testing.

## **Operation Considerations**

If a Hospital is located in a state or region that passes the Gating Criteria, the Hospital is instructed to focus on six (6) areas of its operations to determine whether the Hospital is ready to recommence normal operations.

These areas of operation include:

1. the availability of appropriate personal protective equipment for all Hospital staff;
2. the availability of sufficient Hospital staff who have been screened and found not to be infected with COVID-19 to treat non COVID-19 patients;

3. the ability to physically separate COVID-19 patients from non COVID-19 patients within the Hospital in order to avoid the spread of COVID-19 from COVID-19 patients to non COVID-19 patients;
4. the ability to appropriately disinfect space and equipment within the Hospital used to treat COVID-19 patients before such space and equipment is used to treat non COVID-19 patients;
5. the possession of an adequate inventory of supplies to treat non COVID-19 patients while maintaining a sufficient inventory of supplies to treat additional COVID-19 patients if a surge in COVID-19 illness should occur; and
6. the capability of testing all patients for COVID-19 before a patient is permitted to enter the part of the Hospital where non COVID-19 patients are being treated.

For the most part, the Re-Opening Recommendations seem to be a distillation of common sense applied to the current situation. That said, it is certainly helpful to have direct guidance from CMS on this crucial question.

As this question is debated in all quarters of the healthcare industry, it is anticipated that other organizations and groups may provide their own guidance on the question of when and how a Hospital should recommence normal operations. For example, on April 17, 2020, the American College of Surgeons, the American Society of Anesthesiologists, the Association of periOperative Registered Nurses and the American Hospital Association issued a joint statement on when and how Hospitals should recommence normal operations.[\[4\]](#) Separately, on April 17, 2020, the American College of Surgeons issued its own statement on this issue.[\[5\]](#)

## **Key Takeaways**

This industry-level guidance is likely to be more detailed in many respects as it focuses more closely on the specific issues relevant to the group issuing the guidance. As a result, Hospitals should consider using this industry-level guidance to supplement the Re-Opening Recommendations to more specifically address specific issues related to recommencing normal operations.

In the end, the good news is that Hospitals now have useful guidance from both CMS and the industry to guide them as they consider when and how to get back to

normal.

This blog post was drafted by [Donn Herring](#), an attorney in the Spencer Fane LLP St. Louis office. For more information, visit [www.spencerfane.com](http://www.spencerfane.com).

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[1] OPENING UP AMERICA AGAIN: Centers for Medicare & Medicaid Services (CMS) Recommendations Re-opening Facilities to Provide Non-emergent Non-COVID-19 Healthcare: Phase I, <https://www.cms.gov/files/document/covid-flexibility-reopen-essential-non-covid-services.pdf>.

[2] Non-Emergent, Elective Medical Services, and Treatment Recommendations, <https://www.cms.gov/files/document/cms-non-emergent-elective-medical-recommendations.pdf>.

[3] Guidelines: Opening Up America Again, <https://www.whitehouse.gov/openingamerica/#criteria>.

[4] Joint Statement: Roadmap for Resuming Elective Surgery after COVID-19 Pandemic, <https://www.facs.org/covid-19/clinical-guidance/roadmap-elective-surgery>.

[5] Local Resumption of Elective Surgery Guidance, <https://www.facs.org/covid-19/clinical-guidance/resuming-elective-surgery>.